Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

Clyde Terry and Anne Terry,

Petitioners

v.

Alan and Karen Levens,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

On Petition for a Writ of Certiorari to the California Supreme Court

Patrick H. Dwyer
Counsel of Record
P.O. Box 1705
17318 Piper Lane
Penn Valley, California 95946
530-432-5407

Michael W. Pott
Porter, Scott, Weiberg & Delehant
350 University Ave., Sacramento, CA 95825
916-929-1481

Attorneys for Petitioners
July 12, 2005

QUESTIONS PRESENTED

1. Does the judicial nullification by the California Court of Appeal of the statutory time requirement for the filing of a cross-complaint violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution?

2. Does the judicial nullification by the California Court of Appeal of the statutory right to submit a brief on an issue not previously raised or briefed by any party, but which has been raised *sua sponte* as the central issue in the appeal, violate both the Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution?

3. Does the lack of subject matter jurisdiction over the issue that is central to a decision of the California Court of Appeal violate the Due Process Clause under the Fourteenth Amendment to the U.S. Constitution?

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PETITION FOR A WRIT OF CERTIORARI

Mr. and Mrs. Clyde and Anne Terry, The Terry Family Trust, and Kenney Wayne Odom respectfully petition for a writ of certiorari to the California Supreme Court to review the judgment of the California Court of Appeals, First Appellate District, Division 2, in the matter of *Terry v. Levens*.

OPINIONS BELOW

The unreported opinion of the California Court of Appeals in Case Nos. A103827 and A106673 was dated February 3, 2005. Petitioners' Appendix ("Pet. App.") at A1-27. A petition for rehearing before the California Court of Appeal was denied without comment on February 25, 2005. Pet. App. at A28. A petition for review before the California Supreme Court, No. S132017, was denied on April 20, 2005, without comment. Pet. App. at A55.

JURISDICTION

The jurisdiction for this petition for a writ of certiorari is based upon 28 U.S.C. §1257(a).

THE FEDERAL ISSUES WERE RAISED IN THE APPELLATE COURT

The federal questions pertaining to the application of the Fourteenth Amendment to the U.S. Constitution were expressly raised by Petitioners in the petition for rehearing filed with the California Court of Appeal and in the petition for review filed with the California Supreme Court, Pet. App. at A35, A41-42, A47-50.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment XIV, § 1:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure §428.50:
Filing of Cross Complaint; Leave of Court

(a) A party shall file a cross-complaint against any of the parties who filed the complaint or cross-complaint against him or her before or at the same time as the answer to the complaint or cross-complaint.
(b) Any other cross-complaint may be filed at any time before the court has set a date for trial.
(c) A party shall obtain leave of court to file any cross-complaint except one filed within the time specified in subdivision (a) or (b). Leave may be granted in the interest of justice at any time during the course of the action.

California Government Code §68081:
Appellate review; supplemental briefing; rehearing

Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered

upon the timely filing of any party.

California Code of Civil Procedure §906:
Powers of reviewing court; matters reviewable

Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party ... The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken.

STATEMENT OF FACTS

In April, 2001, Petitioners Clyde and Anne Terrys (hereafter "Terrys"), owners of property in Dixon, California, entered into a commercial lease with Alan and Karen Levens (hereafter "Levens") for a certain portion of the property for use as a dog kennel and obedience training facility. After over a year and a half of attempting to obtain the Levens' compliance with certain terms of the lease, the Terrys filed suit to terminate the lease in late November, 2002 (hereafter the "Original Action"). In February, 2003, the Terrys received from Solano County a Notice of Violation and Order to Comply concerning electrical wiring and a trailer that the Levens had installed on the leased premises without a permit from the county and in violation of the lease. The County notice and order gave the Terrys just thirty days to have the wiring and trailer removed. Having already tried unsuccessfully for nine months to get the Levens to do this, the Terrys had no choice but to file a motion for a temporary restraining order to enforce the Solano County Order.

At the March 14, 2003, hearing on the TRO Motion, the Terrys presented their evidence respecting the hazardous electrical wiring and the illegal trailer. The Levens did not present any factual rebuttal evidence. At the conclusion of the presentation of evidence, the trial court pronounced: "I'm going to set the matter for trial." The trial court choose April 11, 2003, for the start of trial, which was less than thirty days away (hereafter "Trial Date Order"). Counsel for the Levens then mentioned that the Levens contemplated filing a cross complaint and requested severance thereof. The trial court responded "[a]s to the cross complaint, I'm going to sever it." (hereafter "Severance Order). The severance of a cross complaint or part of an action is proper under California Code of Civil Procedure §1048.

There were pre-trial conferences on April 9, 2003, and then again on April 24, 2003, at which time the trial court, *sua sponte*, ultimately re-set trial for July 21, 2003. Despite motions by the Terrys seeking permission to conduct discovery of evidence to present their case, the trial court denied any opportunity for discovery.

Trial commenced on July 21, 2003, and at the conclusion of the Terrys' case in chief, the trial court granted the Levens' motion for nonsuit with respect to the First, Second, Sixth and Seventh Causes of Action. The granting of the nonsuit effectively gutted the Terrys' case and the jury returned a verdict in favor of the Levens on the remaining three lesser counts. The Terrys filed a notice of appeal on August 13, 2003, based upon the denial of discovery as a violation of due process and a lack of any statutory preference for the Trial Date Order. The Levens did not file any cross appeal. The Terrys appeal was assigned case no. A103827.

On November 6, 2003, about four months after appeal of the Original Action and without making any motion for leave of court, the Levens filed a cross complaint in the Original Action. On December 31, 2003, the Petitioners filed a Motion to Strike on the grounds that the cross complaint had been filed four months after entry of final judgement and without leave of court in direct violation of California Code of Civil Procedure (hereafter "CCP") §428.50. The trial court granted the Motion to Strike without leave to amend on April 28, 2004. The Levens filed an appeal on May 26, 2004 (hereafter "Cross Complaint Action", appellate case no. A106673). The Levens argued only two grounds for their appeal: (1) the cross complaint was not barred by CCP §428.50; and (2) the decision in *City of Hanford* 208 Cal. App. 3d 580 (1989) (hereafter "*City of Hanford*"), interpreting CCP §428.50 to mean that a cross complaint had to be filed before the entry of final judgement, was not applicable. The Levens never argued that the Severance Order was improper or that they had been prejudiced by either the Trial Date Order or the Severance Order.

The briefing by all parties in both appeals was completed by August 24, 2004. The two appeals were consolidated for purposes of oral argument, which was heard on December 13, 2004. The Court of Appeal issued its decision on February 3, 2005, reversing and remanding the judgement in the Original Action. At the same time, the Court of Appeal reviewed the trial court's order dismissing the Cross Complaint Action and found that the grounds for the trial court's dismissal under CCP §428.50 were correct and that the decision in *City of Hanford* was applicable and correct.

However, the Court of Appeal, without any finding of fact or law, ordered the appeal of the Cross Complaint Action "moot". The Court of Appeal acknowledged that it "was true that defendants [Levens] could have filed an answer [with a cross complaint] prior to trial" but that "defendants [Levens] may have been as prejudiced by the trial court's erroneous acceleration of trial as plaintiffs [Terrys]." The Court of Appeal then directed the trail court to allow a cross complaint, even though expressly time barred by CCP §428.50, because it was the court's opinion that it would be "unjust" to allow the case to proceed without allowing the Levens to file a cross complaint. The Court of Appeal never stated under what authority it made this ruling. Since there was clearly no statutory authority, it was presumably made under the court's "inherent" power.

The Petitioners filed for rehearing with the Court of Appeal on February 18, 2005. The Court of Appeal denied the petition for rehearing without comment on February 23, 2005. The Petitioners then sought review with the California Supreme Court on March 6, 2005, and review was denied without comment on April 20, 2005. This Petition for a Writ of Certiorari followed.

WHY A WRIT FOR CERTIORARI SHOULD ISSUE

A. Introduction

This case presents questions at the very core of the judicial system in every court in this country. The California Court of Appeal deliberately refused to enforce two California statutes creating rules of civil procedure that are central to everyday legal practice. By refusing to enforce these valid statutes without any cause or reason, the California Court of Appeal *judicially nullified* them simply

because it did not like the result that enforcement of the statutes would bring.

It is the responsibility of the legislative branch to write the laws. Absent some finding that a statute is unconstitutional, inapplicable under particular facts, superceded by another statute, or some other appropriate reason, a court must enforce the statute because it embodies the will of the people as expressed by their representatives in the legislative branch.

There is a great deal of debate at this time about the concept of "judicial activism". This case presents an extreme example. Persons of every political persuasion in our democracy would likely concur that a court cannot refuse to enforce a law that was validly enacted by a legislature merely because the court does not like the result in a particular case. Otherwise, every court could substitute its own idea of what statutes should be enforced on a case-by-case basis in complete disregard for the will of the majority expressed through the legislature.

Judicial Nullification is an extreme example of the denial of due process. In this case, the California Court of Appeal refused to enforce valid laws establishing very important rules of judicial procedure to achieve the outcome it desired. If the California Court of Appeal had enforced the statutes, the outcome would have been the opposite. A court cannot choose which statutes it will or will not enforce in a particular case merely to achieve a desired result. Nullification is a structural due process error that denies a litigant the ability to prosecute or defend an action according to known and defined rules of procedure. How can due process exist if a court can, on its own motion, decide which judicial procedure statutes it is going to enforce? Due